

HONG LEONG FINANCE BHD

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v.

DAYASAR INDUSTRIES SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[SUIT NO: KG 100-1991]
9 OCTOBER 2001

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CIVIL PROCEDURE: *Res judicata* - Whether there are triable issues - Rules of the High Court 1980, O. 14 - Whether finding of chambers judge a dicta - Whether court at liberty to differ upon evidence adduced at trial - Whether issue of *res judicata* applicable

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The defendants raised a preliminary issue in that the subject matter of the trial was *res judicata* since the same points had been canvassed and decided by the chambers judge when he dismissed the plaintiff's application under O. 14 and O. 18 of the Rules of the High Court 1980 (RHC). The preliminary issue was dismissed and hence this appeal.

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Held:

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[1] In an O. 14 application, the chambers judge is only required to determine whether there are triable issues or the defence is not a sham defence. The chambers judge's judgment must be tailored to that application alone without getting into the merits of the suit proper. (p 154 e)

[2] The chambers judge had disallowed the plaintiff's earlier application under O. 14 and the court considered the finding of the chambers judge on the main issue *ie*, the settlement of the loan, a *dicta*. The remark by the chambers judge concerned only with whether the defendants had succeeded in raising a triable issue or otherwise. A *dicta* is not a judgment. In the circumstances, there was no question of the said issue to be *res judicata*. (p 154 f-g)

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[3] It was clearly incumbent upon the court to reconsider the *dicta* of the chambers judge at the trial proper and the court is at liberty to differ upon the evidence to be adduced at the trial. The court referred to the case of *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors*. (p 154 h)

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[Issue of *res judicata* not applicable; hearing of case to proceed on its merit.]

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a Case(s) referred to:

Alor Jangus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 (**refd**)

Asia Life Assurance Society Ltd v. Kong Leong Aik [1992] 4 CLJ 2053; [1992] 2 CLJ (Rep) 129 (**refd**)

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Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 (**dist**)

Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 (**refd**)

Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 (**refd**)

Syn Lee & Co Ltd v. Bank of China [1961] MLJ 87 (**refd**)

Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 (**refd**)

Tien Ik Sdn Bhd & Ors v. Kuok Khoon Hwong Peter [1993] 1 CLJ 9 (**refd**)

c**Legislation referred to:**

Rules of the High Court 1980, O. 14 rr. 1, 2(1), O. 18 r. 19

Subordinate Court Rules 1980, O. 14 r. 21, O. 26A

For the plaintiff - William Chang (Shankar Ram); M/s Yong & Co

For the defendant - Ernest Chua; M/s Ernest Chua & Co

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Reported by Suhainah Wahiduddin

JUDGMENT**Zakaria Sam JC:****e****Introduction**

At the outset of the hearing of this trial, the learned counsel for the defendants raised a preliminary issue in that the subject matter of the trial is *res judicata* since the same points had been canvassed and decided by Abdul Kadir Sulaiman J (as he then was) (hereinafter referred to as chambers judge) on 12 July 1993 when he dismissed the plaintiff's application under O. 14 and O. 18 of the Rules of the High Court 1980 (after this RHC). After hearing arguments from both sides, I dismissed the preliminary issue raised by the learned counsel for the defendants, hence, this appeal.

f**g****Background**

The plaintiff had on 29 November 1991 filed an application under O. 14 r. 1 and O. 18 r. 19 RHC for summary judgment and striking out the defendants' defence. The facts of this case are as follows.

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By virtue of a memorandum of charge dated 15 January 1987 and registered at the Kuching Land Registry office as Instrument No. L. 2855/1957, the plaintiff had advanced to the 1st defendant a loan of RM1.0 million (the said loan) and the 1st defendant had covenanted to repay the balance of the whole of the said loan together with interests and other charges thereon, on demand. The 2nd to the 8th defendants are the guarantors to the said loan.

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The plaintiff by a letter dated 5 July 1991 demanded from the 1st defendant the repayment of the outstanding balance of the said loan and accrued interests amounting to RM484,456.93 as at 31 May 1991, inclusive of further interests thereon at the rate of 14.25% p.a. on the sum of RM11,076.59 from 1 June 1991. Despite several demands, the defendants refused to pay, thus, compelling the plaintiff to issue this writ on 15 August 1991 against the defendants for the said sums and costs.

The defendants insisted that they are not liable to the plaintiff as the said loan inclusive of interests thereon had been paid by the 1st defendant from the proceeds of sale of the said charged land for a sum of RM1.1 million and the proceeds thereof was paid to the plaintiff on 16 January 1991. The plaintiff in the memorandum of discharge of charge dated 18 January 1991 executed and registered at the Kuching Land Registry office on 19 January 1991, had certified that it had received payment of both principal sum and interests in respect of the registered memorandum of charge and that all obligations expressed or implied by the said charge have been discharged.

The plaintiff contended that it was not its intention by the execution of the said memorandum of discharge to wholly discharge the charge. This could be gathered from the plaintiff's letter dated 23 November 1990 (exh. TBC23) to the defendant. In that letter, the plaintiff agreed that the defendant would sell off the charged property for RM1.1 million but subject to, *inter alia*, that the defendant shall continue to be liable for any balance of loan outstanding after the sale is concluded. In addition thereto, there is also a letter from the defendant to the plaintiff dated 11 February 1991 (exh. TBC24) asking for waiver of the balance outstanding loan after taking into consideration the fact that the principal loan together with part of the interests thereof had been paid. Exhibit TBC25 is a reminder of exh. TBC24.

In reply the secretary to the defendants deposed that exh. TBC24 and exh. TBC25 were written without the authorisation or instruction from the defendants. He also did not know that the defendants had refused to the terms dictated in exh. TBC23. He also did not know that the parties had come to an agreement wherein the plaintiff had agreed to accept RM1.1 million as the redemption sum. The chambers judge accepted the secretary's explanation. He then ruled that:

In any event, it does not help the Plaintiff because the Memorandum of Discharge is a complete term reduced to the form of a document and as such under section 91 of the Evidence Act 1950 no evidence shall be admissible in proof of it except the document itself. Section 92 of the same Act does not apply here as the matters do not concern anything oral but in writing. In this case, the Memorandum speaks for itself. The language is clear. Section 154

a of the Sarawak Land Code recognises the whole and partial discharge for purpose of registration. If the intention of the Plaintiff was merely towards partial discharge, it would have been so in the Memorandum. But in this case the Memorandum speaks of the whole as opposed to partial discharge.

b Such being the case, the chambers judge ruled that there were triable issues and the defence was not a sham.

c It is the submission of the learned counsel for the defendants before this court that the trial, if allowed to proceed, would inevitably revolve around these three letters ie, exhs. TBC23, TBC24 and TBC25. Since the chambers judge had considered these three letters and had ruled on the issue of full redemption of the said loan and payment of interests, therefore, the plaintiff cannot now be allowed to reopen its case on the same issue as it is *res judicata*. To allow the trial to proceed on the same decided issue, would tantamount to giving the plaintiff a second bite of the cherry. Further, it was submitted that to allow the plaintiff to proceed with the trial now would be equivalent to enabling the plaintiff to present its case in instalment (see *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553). As the plaintiff did not appeal against the said decision, the counsel for the defendants further submitted that the door on this issue is now permanently closed and the fate of the plaintiff has been sealed. Therefore, the court is now *functus officio* on this particular issue of the plaintiff attempting to claim interests from the defendants in relation to the said loan which had been clearly determined by the memorandum of discharge of the charge.

The Law

f The duty of a chambers judge in entertaining an interlocutory summary application is very clear. In *Syn Lee & Co Ltd v. Bank of China* [1961] MLJ 87, Thomson CJ explained the summary jurisdiction under O. 14 RHC as:

g In a case of this sort it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very degree that the defendant can possibly succeed.

h In *Ng Hee Thoong v. Public Bank Bhd* [1995] 1 CLJ 609, the Supreme Court held that O. 14 is a summary judgment procedure and not a summary trial procedure. Under O. 14 the chambers judge must not try disputed issues of fact or law. The court should refrain from turning a summary judgment into a summary trial. There is no provision of a summary trial in our RHC.

i In *Asia Life Assurance Society Ltd v. Kong Leong Aik @ Simon Kong* [1992] 4 CLJ 2053; [1992] 2 CLJ (Rep) 129, it was held that in both applications under O. 26A and O. 14 r. 21 of the Subordinate Courts Rules 1980, the court must ask itself whether there are triable issues and whether the defence is a

sham. In the instant case, a decision had been made as regards to the O. 14 r. 2(1) application giving leave to defend. This application is merely an order that there should not be a judgment for the appellant at this stage. Since the doctrine of *res judicata* requires the issues in dispute to have been fully decided by the court, the doctrine was not applicable here as no judgment has been given.

In this case the appellants claimed specific performance of a contract for the sale of land which he claimed was embodied in an exchange of letters between the parties. The respondents had failed to complete the contract and the first appellant had lodged a caveat against the land. The respondents had applied for the removal of the caveat. The learned trial judge heard both applications and he allowed the respondent's application with costs and ordered the removal of the caveat, dismissed the appellant's application under Order 14A of the Rules of the Supreme Court with costs and then went on to further order the dismissal of the appellant's action out of court with taxed costs. The appellants appealed.

Held by the Federal Court: (1) the learned judge had no power in an application for summary judgment to dismiss the action. All that was open to him to do in regard to the appellant's application for summary judgment under 14A was to give the respondent unconditional leave to defend. It was further held that for the purpose of an application for summary judgment, a judge does not decide a matter as at a trial.

In *Tien Ik Sdn Bhd & Ors v. Kuok Khoon Hwong Peter* [1993] 1 CLJ 9, the Supreme Court observed that:

The hearing before the learned judge is only an application under this originating summons for an interim injunction, the learned judge, in our view, should not have dealt with the application in such a manner so as to give the impression in his judgment that he had in fact disposed of the originating summons itself on its merits based on the affidavits of the parties to the application. It is necessary to bear in mind in an application for an interim injunction that the court is not called upon to make any final decision on any question of fact. What is relevant and required at that stage is for the learned judge to decide on the affidavits available before him that the claim in the originating summons is not frivolous or vexatious; in other words, that there is a serious question to be tried and having so decided he must go on to consider the question of balance of convenience. In this regard it is pertinent to quote a passage from Lord Diplock's judgment in *American Cyanamid v. Ethicon* appearing at p. 510 where he said:

- a* It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.
- b* In another Supreme Court case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461, it was held that:

At an interlocutory proceeding for an injunction, the court is not called upon nor is it desirable for the court to decide finally on the rights of the parties but the court must be satisfied that there is a serious issue to be tried. The court is not justified in embarking upon anything resembling the trial of the action upon conflicting affidavits nor to evaluate the strength of either party's case.

- d* Although the views expressed in the above cases were in the context of applications for injunction, they are, I think, of general application as well.

Findings

- e* Based on the authorities cited above, even though the chambers judge did remark that the defendants had fully repaid the loan and interests thereof, however, for the purpose of this trial I am not bound by that finding. In an O. 14 application, the chambers judge is only required to determine whether there are triable issues or the defence is not a sham defence. The chambers judge's judgment must be tailored to that application alone without going into the merits of the suit proper.

- f* It must be remembered that the chambers judge disallowed the plaintiff's earlier application under O. 14. I consider the finding of the chambers judge on the main issue ie, the settlement of the loan, a *dicta*. The remark by the chambers judge concerned only with whether the defendants had succeeded in raising a triable issue or otherwise. Clearly, there could not be any finality or decisiveness in the finding of the chambers judge on the payment of the redemption sum as it would be contrary to the general principles as adverted to earlier in this judgment. A *dicta* is not a judgment. In the circumstances, there is no question of the said issue to be *res judicata*.

- h* For that matter, it is clearly incumbent upon me to reconsider the *dicta* of the chambers judge at the trial proper and I am at liberty to differ upon the evidence to be adduced at the trial. On this point, it is useful to refer to the judgment of Gopal Sri Ram, JCA in *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900, where it was held:

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In my judgment, a judge may, after expressing a view in the course of an interlocutory proceeding, quite properly hear the main action and come to a conclusion diametrically opposite to that expressed at the interlocutory level. Translated to a case such as the present, a judge may grant an interlocutory injunction because he finds a particular line of defence taken to be untenable and yet, after hearing all the evidence and detailed argument at the trial, reach the opposite conclusion and dismiss the suit. I cannot help but think that such an occurrence is commonplace in our courts as it is indeed in other jurisdictions.

The learned counsel for the defendants also cited *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, a Court of Appeal case as an authority as to the finality of an earlier decision. That case is not a summary judgment application and could be easily distinguished on its facts.

Conclusion

Based on the above reasons, I rule that the issue of *res judicata* is not applicable and I order the hearing of the case to proceed on its merit.

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